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RICHMOND DISTRICT NEIGHBORHOOD CENTER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

RICHMOND DISTRICT NEIGHBORHOOD CENTER

And

IAN CALLAGHAN, an individual

Case # 20-CA-091748

RESPONDENT RICHMOND DISTRICT NEIGHBORHOOD CENTER'S OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Hearing: July 23, 2013
Decision Rendered: November 5, 2013

Hon. Jay R. Pollack

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INTRODUCTION

The General Counsel's Exceptions and Brief misrepresent the evidence presented at the July 23, 2013 hearing before the Administrative Law Judge. A review of the transcript and exhibits from the hearing dispels the arguments put forth by the General Counsel. For example, the General Counsel begins its argument by claiming that Callaghan and Moore had "laudatory job performance records" before their Facebook conversation. (General Counsel's Brief at p. 1.) This is not true. In actuality, the evidence shows that Ms. Moore's summer supervisor, Shawn Brown, said he would not re-hire her and marked her performance as "poor." (RT 173:8-21; Respondent's Exhibit 3.)

The fundamental fact here is that Respondent runs an after-school program and it's ultimate responsibility is to ensure the safety of its youth. Given the outright safety threats made in the Facebook conversation between Callaghan and Moore, a finding that Respondent violated the law in rescinding the re-hire letters would be ludicrous. What was Respondent supposed to do when it became aware of the statements and threats being made? What would happen if a child was injured when Mr. Callaghan or Ms. Moore left the kids alone (as Ms. Moore threatened) or took them on an unauthorized field trip "whenever the fuck they wanted" (as Mr. Callaghan threatened)? In a personal injury lawsuit resulting from such an injury, a plaintiff's attorney would have a field day with the Facebook posts to support a claim for punitive damages, showing that Respondent knew these employees were unfit to work with children, yet kept them on.

However, this is just one factor in the consideration. Another crucial fact established at trial is that the postings threatened the funding - and, therefore, the very existence - of the Beacon. Respondent is a nonprofit organization. The undisputed testimony from Respondent's witnesses (and even General Counsel's own witnesses) established that Respondent has rules and regulations which must be followed to keep its funding, and that in their postings, Callaghan and Moore stated they would violate these very rules, in addition to disregarding supervision. Callaghan admitted he was aware of these rules and further admitted that his posts violated these rules. (RT 49:25-50:1; 59:20-60:1 & 59:2-6.)

The General Counsel argues that the Facebook conversation was "private," apparently contending that funders, the School District, students and parents could not gain access to the postings. However, it is undisputed that Ms. Huck, an employee of Respondent, viewed the postings, although she was not Facebook Friends with Mr. Callaghan or Ms. Moore. At the hearing, Mr. Callaghan had no explanation how Ms. Huck was able to gain access to his supposed "private" conversation. And, as we all know, once something is posted on the internet, it is there forever and nothing is really private. Moreover, whether the conversation was "private" is of no avail. (See, e.g., *Tasker Health Care Group,* Case No. 04-CA-094222 (May 8, 2013).) Callaghan testified he had no way of knowing if parents, youth, school officials or others saw the posts. (RT 52:11-55:1.) Respondent's witnesses believed the postings were public. (RT at 122:22-123:1 & 154:1-9.)

It was the duty of the Administrative Law Judge to assess witness credibility in rendering his Decision. The Judge did just this, stating "witnesses testifying in contradiction to the ALJ's findings were discredited, either a having been in conflict with credited or testimonial evidence

or because it was in and of itself incredible and unworthy of belief" (ALJ Decision, page 1, fn. 1.) As to factual determinations by the ALJ on witness credibility, specifically those introduced by the General Counsel (Ian Callaghan, Sara Godfrey and Cole Manieri) and Respondent (Jan Nicholas, Michelle Cusano and Patricia Kaussen) due deference must be given to the ALJ's credibility resolutions. (*Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F.2d 363 (3rd Cir. 1951).) There is no basis for disturbing the ALJ's conclusion that Respondent did not violate Section 8(a)(1) of the Act by withdrawing the rehire letters. (ALJ Decision at 6:38-39.).

The General Counsel argues that Callaghan had a benign explanation for each of his Facebook comments. (For whatever reason, Ms. Moore did not testify and, therefore, offered no alternative "explanation" for her posts.) Callaghan's self-serving testimony was assessed by the ALJ who saw his demeanor and heard his testimony. Callaghan and Moore threatened to leave youth alone, take them on unauthorized field trips and stated they would not follow the instructions of their supervisors. Regardless whether Callaghan "intended" to carry out these threats, the damage was done when he and Moore posted such comments, and it was more than "objectively reasonable" for Respondent to conclude that these statements jeopardized the safety of the youth in their care and threatened Respondent's contracts with the San Francisco Unified School District and other funding sources.

The General Counsel has been going after Respondent, a small non-profit organization, for years now. Enough is enough. The parties had their day in court and this matter should be put to rest. This is not the typical case involving a business entity. Rather, Respondent is legally, contractually and morally obligated to ensure the safety of its youth. It is also contractually obligated to provide personnel which are positive role models for youth. Under the

circumstances of this case, Respondent did not violate the law.

FACTUAL BACKGROUND

A. Respondent's Beacon After School Program

Richmond District Neighborhood Center (RDNC) is a San Francisco-based, non-profit organization. One of its programs is the Beacon, which provides services to middle school and high school youth, primarily after school. (RT at 120:5-10.) The majority of students are from George Washington High School, and the Beacon facilities are located on the George Washington High School campus in San Francisco. (RT at 20:21-24 & 22:4-5.)

The Beacon must abide by strict program guidelines in order to maintain its funding. The Beacon is responsible to ensure a safe environment for youth attending the Beacon programs. (RT at 124:25-126:3 & 129:11-15.) Pursuant to the Memorandum of Understanding (MOU) with the San Francisco Unified School District (SFUSD), the Beacon must provide safe activities and a healthy environment. (RT at 124:25-125:3; Respondent's Exhibit 2.) The Beacon personnel are there to provide the youth with a safe environment, to help them with their homework, and to be role models. (RT at 126:20-24.)

There are strict pre-approval requirements for, among other things, "Off Site Program Activity" or field trips. Washington High School (and the SFUSD) specifically prohibit graffiti. (RT at 124:1-4.) Another example is that the Beacon is also required under its contracts to provide healthy food. (RT at 157:23-158:6.)

B. Charging Party's Employment with Respondent

Mr. Callaghan worked as the Teen Center Activity Leader at the Beacon from August of 2011 to June of 2012. (RT at 21:16-20.) His supervisor was Rena Payan. (RT at 22:14-15.)

In May of 2012, Ms. Payan held a meeting among Teen Center staff at which time she handed out performance evaluations for her staff to give her, and also provided a piece of "butcher paper" for staff to write down the pros and cons of working at the Beacon. She left this meeting, and staff then made comments anonymously on the butcher paper. (RT at 24:21-26:4.)

This meeting took place the very last week before school was out for the 2011/2012 year. (RT at 80:15-18 & 90:25-91:11.) According to Mr. Callaghan, at the meeting, staff discussed the following: feeling unappreciated, lack of supervision, high staff turnover, feeling ignored and mistreated, and wanting more information about the budget. (RT at 26:22-27:19). No one signed their names to the complaints, so it was unknown which staff made specific comments. (RT at 81:23-24 & 90:22-24.)

Mr. Callaghan acknowledged that this May meeting had been encouraged by management. (RT at 49:10-13.) Michelle Cusano, Beacon Director, was receptive to the May meeting. (RT at 179:14-15.) After the meeting, Ms. Cusano had her assistant to make notes from the butcher paper so the anonymous complaints could be addressed in order to improve the Beacon's programs. (Exhibit GC 5; RT at 188:11-189:4)

After the May meeting, Mr. Callahan was offered a summer position as well as employment for the fall of 2012. (Joint Exhibit 5; RT at 49:18-23.) Ms. Moore was also offered summer employment and employment for the fall of 2012 after the May meeting. (See, e.g., Joint Exhibit 6.) The parties stipulated that both Mr. Callaghan and Ms. Moore were at-will employees.

C. The Facebook Postings & The Decision to Rescind the Rehire Letters

On or about August 2, 2012, Sarah Huck, RDNC's Neighborhood & Family Program Coordinator, was able to visit Mr. Callaghan's Facebook page, and came across the following Facebook message chain ("Facebook Chain") between Mr. Callaghan and Kenya Moore, another Beacon seasonal employee, which provides, in pertinent part below:

Kenya Duh[1] - August 2 at 7:21 pm
U gOin baCk [to the Beacon] or NO??

Ian Callaghan - August 2 at 7:23 pm
I'll be back [to the Beacon], but only if you and I are going to be ordering shit, having crazy events at the Beacon all the time. I don't want to ask permission, I just want it to be LIVE. You down?

Kenya Duh - August 2 at 7:25 pm
Im gOin to be a activity leader im not doin the t.c.[2] let them figure it out and when they start loosn kids I aint helpn HAHA

Ian Callaghan - August 2 at 7:29 pm
hahaha. Sweet, now you gonna be one of us. Let them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach the kids how to grafitti up the walls and make it look cool, get some good food. I don't feel like bein their bitch and making it all happy-friendly-middle school campy. Let's do some cool shit, and let them figure out the money. No more Sean. Let's fuck it up. I would hate to be the person takin your old job."

Kenya Duh - August 2 at 7:32 pm
Im glad im done with that its to much and never appreciated sO we just gobe have fuN dOin activites and the best part is WE CAN LEAVE NOW hahaha I AINT GOBE NEVER BE THERE even thO shawn gone its still hella stuck up ppl there that don't appriciate nothing

Ian Callaghan - August 2 at 7:40 pm
You right. They don't appreciate shit. That's why this year all I wanna do is shit on my own. have parties all year and not get the office people invovled. just do it and pretend they are not there. i'm glad you arent doing that job. let some office junkie enter data into a computer. well make the beacon pop this year with no ones help.

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[1] Ms. Moore's Facebook screen name is "Kenya Duh."

[2] "t.c." refers to the Teen Center.

Kenya Duh - August 2 at 7:45 pm
They gone be mad cuZ on Wednesday im goin there aNd tell theM mY title is ACTIVITY LEADER don't ask me nothing abOut the teen cenTer HAHA we gone have hella clubs and take the kids ;)

Ian Callaghan - August 2 at 7:23 pm
hahaha! fuck em. field trips all the time whereever the fuck we want!

Kenya Duh - August 2 at 8:25 pm
You see what we Go thrU we there fOr the kids i don't knOw abOut everbOdy eLse

This conversation took place over the course of over an hour (7:21 p.m. to 8:25 p.m.), not a "½ hour" as General Counsel asserts at page 13 of its brief. (See Joint Exhibit 7.)

On or about August 3, 2012, Ms. Huck sent the Facebook Chain to her direct supervisor, Michelle Cusano (Beacon Director) and Brock Ogletree, Site Manager. (See Joint Exhibit 8; RT at 153:14-17.) In her personal notes dated August 6, 2012, Human Resources Director, Jan Nicholas, wrote that "[t]he tone of the posts were enough to make us very concerned about having these employees working with youth (high school age). We expect our staff to provide role models for youth, especially at the High School Level." (See Joint Exhibit 9.)

Ms. Kaussen (Executive Director), Ms. Nicholas (HR) and Ms. Cusano (Beacon Director) then met to discuss the matter and made the decision to rescind Mr. Callaghan's re-hire letter (as well as Ms. Moore's re-hire letter) based on the Facebook posts. (RT at 133:10-12, 166:25-167:4 & 196:2-11; Joint Exhibit 10.) All three of these RDNC employees testified at the hearing.

D. Respondent Rescinds Callaghan & Moore's Rehire Letters

On August 13, 2012, Mr. Callaghan was sent a letter rescinding his July 31, 2012 re-hire Letter. (See Joint Exhibit 10.) Ms. Moore was also sent a letter rescinding her re-hire letter on August 13, 2012. (Joint Exhibit 11.)

RDNC cited the Facebook posts between Mr. Callaghan and Ms. Moore "regarding how [they] intend[ed] to work in [RDNC] programs" as the reason for the decision to rescind the Rehire Letter. (*emphasis added*). The letter went on to cite specific examples of language that disturbed the RDNC, including "[...] you say that you will not do what you are hired to do, will not accept direction, and will do what you want." RDNC concluded that "[t]hese statements [gave them] great concern about [Mr. Callaghan] not following the direction of [his] managers in accordance with the RDNC program Goals." (Joint Exhibits 10 & 11.)

Ms. Nicholas confirmed at the hearing that her August 13, 2012 letters set forth the reasons for the rescission of the re-hire letters, and that the offer letters were rescinded solely because of the Facebook posts. (RT at 133:13-25.) All RDNC's witnessed confirmed at trial that the rescission had nothing to do with any complaints about working conditions. (See, e.g., RT at 134:16-19.)

RESPONSE TO GENERAL COUNSEL'S ARGUMENTS

Respondent did not file an appeal of the ALJ's decision, as the ALJ correctly found that the Facebook statements lost protection under the Act. However, now that General Counsel has filed this appeal, Respondent will address all the General Counsel's arguments, including General Counsel's assertion that the ALJ correctly found that the Facebook conversation was protected concerted activity, as Recent Advice memos support the finding that the Facebook

postings are not protected concerted activity. (See, e.g., *Wal-Mart*, Case No. 17-CA-25030 (July 19, 2011) and *Tasker Healthcare Group*, Case No. 04-CA094222 (May 8, 2013).

Respondent also addresses this argument to preserve its right to appeal this matter to Federal Court, should that be necessary.

I. THE FACEBOOK CONVERSATION DID NOT CONSTITUTE PROTECTED CONCERTED ACTIVITY

General Counsel first argues that the ALJ correctly found that Callaghan and Moore engaged in protected concerted activity. (General Counsel's Brief at pp. 2-4.) The basis for the ALJ's decision is that he found the Facebook conversation which took place on August 2, 2012 to be a continuance of discussions at a May, 2012 meeting (over 2 months prior) which Callaghan and Moore attended. (ALJ Decision at 5:25-41.)

However, as can be seen from the Facebook conversation, there is no reference to the May, 2012 meeting and nothing to indicate the conversation relates to the May meeting. Rather, Callaghan and Moore spoke about whether they were returning to work at the Beacon (as work was seasonal, coinciding with the San Francisco Unified School Districts's school year) and how they intended to flagrantly violate rules at the Beacon and were going to do whatever they wanted, including "having crazy events at the Beacon all the time," "teach the kids how to graffiti up the walls," "do some cool shit," "fuck it up," "do shit on my own," "field trips all the time wherever the fuck we want." (Joint Exhibit 7.)

As discussed below, this Facebook conversation should not constitute protected concerted activity under the Act.

A. Callaghan and Moore's Facebook Comments Were Expressions of Individual Gripes Rather than Looking Towards Group Action

Respondent does not dispute that the May, 2012 meeting constitutes protected concerted activity. However, Respondent takes issue with the General Counsel's contention (and ALJ's finding) that the Facebook conversation months later was a continuation of the meeting and, therefore, protected concerted activity. A reading of the unequivocal language of the postings shows that Callaghan and Moore were boasting, making personal gripes and threats - there is nothing in the Facebook postings (recited above) which can show that the conversation was a "follow-up" to the May, 2012 meeting.

The only "evidence" purportedly connecting the comments to the May meeting was Callaghan's self-serving, scripted trial testimony where he claims that every comment defies its plain language and actually means something else. Moore did not testify or try to "explain" her comments and the ALJ correctly excluded Callaghan's attempt to testify as to what Moore "meant" by her postings. (RT 40:15-17 & 41:3-12.) Thus, her words can only be taken at face-value.

An employee is only engaged in protected concerted activity when he acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." NLRB Memorandum OM 11-74, August 18, 2011. The Act, therefore, requires that the activities in question be "concerted" before they can be "protected." *See Meyers Industries*, 268 NLRB 493, 494 (1984) *(Meyers I), remanded sub. nom. Prill v. NLRB*, 755 F.2d 941, 244 U.S. App. D.C. 42 (D. C. Cir. 1985), *reaffirmed on remand* 281 NLRB 862 (1986) *(Meyers II) affirmed sub. nom. Prill v. NLRB*, 835 F.2d 1481, 266 U.S. App. D.C. 385 (D. C. Circuit. 1987).

Moreover, "concerted activity" does not include an individual's action simply because the action ought to be of group concern. *Meyers I*, 268 NLRB at 497. Where the employee's activity is the expression of a personal or individual gripe and not a protected concerted activity, the termination will not violate the NLRA. *NLRB Mem. OM 11-74.* Thus, a limitation on off-duty speech that does not relate to the terms and conditions of employment or involve a "concerted" effort with or on behalf of other employees will not violate the NLRA. *See Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980) (Section 7 protection will only be afforded to the actions of a single employee when the action "looks to group rather than mere individual action, and includes 'some element of collective activity or contemplation thereof,' or it is shown 'that the individual in fact was acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in the theoretical sense").

The Division of Advice recently applied *Meyers I* and *Meyers II* in recommending the dismissal of a complaint alleging that an employer violated Section 8(a)(1) by disciplining an employee for positing profane comments on Facebook that were critical of store management. *See Wal-Mart,* Case No. 17-CA-25030 (July 19, 2011). In *Wal-Mart*, the charging party posted comments on his Facebook page such as "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!" *Id.* at 1. Two co-workers responded to the Facebook posts, with what the charging party characterized as "supportive comments." *Id.* at. 2.

The Division found that the charging party's Facebook postings were an expression of an individual gripe because they contained no language suggestive of the employee's inducement of co-workers to engage in group activity and the employee's comments expressed only his individual

frustrations with the assistant manager. *Id.* at 3. The Division further found that the co-workers' Facebook responses indicated that they interpreted the charging party's comments as individual gripes as well. *Id.* Specifically, one co-worker found the Facebook posting humorous and another co-worker's "'hang in there' - type comment" suggested that she only viewed his positing to be a plea for emotional support." *Id.* at 3-4. The Division concluded that there was no evidence that the charging party's postings were "the logical outgrowth of prior group activity" and that the postings showed the employee's frustration with his manager. (*Id.* at 4.)

Similar to *Wal-Mart*, the postings here show Callaghan's frustration and dislike of his supervisor, Sean. Callaghan states "No more Sean. Let's fuck it up. I would hate to be the person taking your old job." (ALJ Decision at 3:22-23). They also show Ms. Moore's opinion that people she worked with were stuck up. She states, "I AINT GON BE NEVER BE THERE even tho [sic] Shawn gone its still hella stuck up ppl there that don't appreciate nothing." (ALJ Decision at 3:28-29.) The one line relied upon for purported concerted activity is when Moore says "U fuck'n right see you Wednesday" and Callaghan responds "I won't be there Wednesday. I'm outta town. But I'll be back to raise hell wit ya." (ALJ Decision at 4:5-7.) These comments do not show intent to engage in group activity.

The Advice Memorandum issued May 8, 2013 in the matter of *Tasker Healthcare Group, d/b/a Skinsmart Dermatology*, Case 04-CA-094222, is also on point. In *Tasker Healthcare Group*, the General Counsel found that the employer did not violate Section 8(a)(1) of the NLRA when it fired the charging party for comments made in a private Facebook group message since the fired employee was not engaged in protected concerted activity when she posted comments to the Facebook Group message.

In *Tasker,* the complainant was employed in a medical office where she engaged in various office duties dealing with patients and office guests. On November 12, 2012, she and 9 other individuals (some current employees) engaged in a private Facebook "group message." The message was initiated by a former employee who wanted to organize a social event. The complainant mentioned a current supervisor who "tried to tell [the charging party] something today and [the charging party] said aren't you the supervisor for mind and body...in other words, back the freak off..." After a few minutes she also said "They [the employer] are full of shit...They seem to be staying away from me, you know I don't bit my [tongue] anymore, FUCK...FIRE ME...Make my day..."

Later that morning, one of the current employees of the message string showed the exchange to the employer. After reading the exchange the employer terminated the charging party, stating it was "obvious" that the charging party was no longer interested in working there. The employer was also concerned with having the Charging Party continue to work with patients, given her feelings about her work and the Employer. (This is particularly relevant to Responding Party's concerns with allowing Mr. Callaghan and Ms. Moore to continue to work with youth in light of the statements they had made.).

The Advice Counsel concluded that the messages did not constitute protected concerted activity, as they did not involve shared employee concerns over terms and conditions of employment. The Advice Memorandum notes that the Board's test for concert is whether the activity is engaged "in with or on the authority of other employees, and not solely by and on behalf of the employee himself." (Citing *Meyers Industries*, 281 NLRB 882, 885, aff'd sub nom., 835 F.2d 1481 (D.C.Cir 1987) Cert. Denied, 487 U.S. 1205 (1988).)

On the other hand, comments made "solely by and on behalf of the employee himself are not concerted." (281 NLRB at 885.) Mere griping by employees who fail to look forward to any action at all is not protected. (*Mushroom Transportation Co., Inc. v. NLRB* 330 F.2d 638, 685.)

Similar to *Walmart* and *Tasker Healthcare*, both Mr. Callaghan and Ms. Moore's Facebook posts were individual gripes, boasting they could do whatever they wanted and making threats to not follow rules while looking after youth in the RDNC after-school program. The conversation did not constitute conduct for the mutual aid and protection of Mr. Callaghan, Ms. Moore or any other employee. The Facebook chain did not attempt to initiate group action regarding the terms and conditions of employment. There are no complaints about wages, work schedule, job security, seniority, job conditions or the like.

By way of example, the Mr. Callaghan's individual gripes included the following:

1) I don't feel like bein their bitch and making it all happy-friendly-middle school campy;
2) You right. They don't appreciate shit; and
3) i'm glad you arent doing that job. let some office junkie enter data into a computer.

(Joint Exhibit 7.)

Likewise, Kenya Moore's individual gripes included the following:

1) Im gOin to be a activity leader im not doin the t.c. let them figure it out;
2) Im glad im done with that its to much and never appreciated;
3) [...] even thO shawn gone its still hella stuck up ppl there that don't appriciate nothing;
4) They gone be mad cuZ on Wednesday im goin there aNd tell theM mY title is ACTIVITY LEADER don't ask me nothing abOut the teen cenTer HAHA ; and
5) You see what we Go thrU we there fOr the kids i don't knOw abOut everbOdy eLse

(Joint Exhibit 7.)

At the July 23, 2013 hearing, Mr. Callaghan testified that his Facebook account was set on "friends" and not public. (RT at 36:20-23.) However, it is undisputed that Ms. Huck was able to access the posts (see, e.g., Joint Exhibit 8). Mr. Callaghan had no explanation how Ms.

Huck was able to access his site since she was not a "Facebook Friend." (RT at 48:24-49:30.) RDNC witnesses all understood that the posts were public, based on conversations with Sara Huck. (See, e.g., RT at 122:22-123:1 & 154:1-9.)

Regardless, however, the issue whether the posts were private or public is not particularly relevant given the fact that the Facebook postings in the *Tasker Healthcare* case were a private "group message" and the Facebook comments in *Wal-Mart* were limited to "Facebook Friends," the same claim made by Mr. Callaghan in this case. Nevertheless, Advice still found the posts were not protected concerted activity in the *Tasker Healthcare* and *Wal-Mart* cases.

B. The "Facts" which General Counsel Argues the ALJ Should Have Found Either Do Not Exist, Are Not Supported By the Record and/or Are Irrelevant (Exception Nos. 2-3)

The General Counsel claims that the ALJ should have found that following the May meeting, Respondent was "annoyed, not receptive and upset with the employees, "took the complaints as a personal attack" and that "Respondent refused to address any employee concerns after the protected concerted May meeting." (General Counsel's Brief at pp. 3-4.) The General Counsel apparently tries to claim that the recision of the re-hire letters, which occurred months later, was in retaliation for the comments made at the meeting.

However, this argument makes no sense. Mr. Callaghan and Ms. Moore were issued re-hire letters in July of 2012, after the May meeting. (Joint Exhibits 5 & 6.) They were also offered summer positions after the May meeting. (RT 49:18-23.) If Respondent was upset by the comments and wanted to retaliate, then the re-hire letters would never have been issued. This argument is simply illogical, and without evidentiary support. Additionally, the comments made at the meeting were anonymous so Respondent would not know which comments were even

from Callaghan or Moore. (RT at 81:23-24 & 90:22-24.)

Furthermore, the claim that "respondent refused to address the employee concerns after the May meeting" is erroneous. Rather, the evidence is that the May meeting took place the very last week before school was out for the 2011/2012 year. (RT at 80:15-18 & 90:25-91:11.) There was only one week left in school after this meeting and no evidence of any "refusal" to address any employee concerns. General Counsel Sara Godfrey testified she did not try to follow-up on the issues raised at the May meeting either in the summer or the fall. (RT 99:17-100:1.)

Ms. Godfrey also failed to support Callaghan's claim that office staff gave teen center staff the "cold shoulder" after the May meeting. Ms. Godfrey testified she "couldn't remember" if she was given the cold shoulder and "couldn't remember" if the office staff treated her differently after the May meeting. (RT 97:4-14.) Another General Counsel witness, Cole Manieri, testified that his supervisor, Rena, did not give him the "cold shoulder" after the May meeting. (RT 117:13-16.) Callaghan also testified that Rena, whom he worked directly with, did not give him the "cold shoulder." (RT 75:3-12.)

Ms. Cusano, Beacon Director testified she was receptive to the May meeting. (RT at 179:14-15.) After the meeting, Ms. Cusano had her assistant make notes from the butcher paper used at the meeting so the anonymous complaints could be addressed in order to improve the Beacon's programs. (Exhibit GC 5; RT at 188:11-189:4.) The General Counsel presented no evidence to contradict Ms. Cusano's testimony.

All three of Respondent's witnesses (Jan Nicholas, Michelle Cusano and Patricia Kaussen) confirmed that the only reason why the re-hire letters were rescinded was because of the Facebook posts, and that the decision to rescind the re-hire letters had nothing to do with the

May meeting or any complaints about working conditions. (See, e.g., RT at 168:12-19.) In fact, neither Jan Nicholas nor Patricia Kaussen were even aware that the May 2012 meeting had taken place when the decision to rescind the re-hire letters was made. (RT at 134:3-12 & 196:12-15.) Although Ms. Cusano was aware of the May meeting, it didn't even cross her mind when making the decision to rescind the re-hire letters. (RT 168:6-8.) Respondent's witnesses were extremely credible. In contrast, Callaghan's testimony was questionable on a number of issues. [3]

The General Counsel improperly attempts to rely on the hearsay testimony of Alexandria Tom to claim that Ms. Cusano was upset after the meeting. (General Counsel's Brief at pp. 3-4.) Even more improper is the General Counsel's attempt to argue that Tom supposedly would have testified that "Cusano was not receptive to the employee complaints and was upset by them." (General Counsel's Brief at 3-4 and FN 1.) Argument from the General Counsel about what a witness would "supposedly" have said is not evidence. The only admissible evidence from Ms.Cusano that she was not upset by the comments. The ALJ was able to assess Ms. Cusano's credibility and demeanor. Plus, whether Ms. Cusano was upset is a red herring, as the

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[3]For example:

(1) Mr. Callaghan testified that he was only Facebook Friends with Kenya, Sarah Godfrey & Alex Tom from RDNC, and no other staff. (RT at 36:22-37:4.) However, another co-worker, Cole Manieri testified that he was also a Facebook Friend with Mr. Callaghan. (RT at 107:17-18.)

(2) Mr. Callaghan testified that after the May meeting, he was given the "cold shoulder" by office staff and supervisors. (RT at 32:5-20.) However, he later admitted that Rena, his supervisor, was friendly and didn't give him the cold shoulder. (RT at 72:7-10 & 75:3-13.) He had no complaints about Jan Nicholas, Michelle Cusano or Pat Kaussen, the three women who made the decision to rescind the rehire letter. (RT at 69:10-19.)

evidentiary record establishes that the recision letters had nothing to do with the May meeting or any workplace complaints.

C. The ALJ Did Not "Fail to Make Important Factual Findings" with respect to the "Context of the Facebook Conversation"

1. The ALJ Did Not Ignore "Facts" Showing the Context of the Facebook Posings (Exception Nos. 11-13 & 24)

The General Counsel apparently faults the ALJ for not citing and/or believing each and every "explanation" Callaghan put forth to try to twist the meaning of the words in his Facebook postings. General Counsel faults the ALJ for not including a factual determination in the Decision that Callaghan was complaining about "mistreatment" by "not being invited to parties" and the like. (General Counsel Brief at p. 6.) This argument makes no sense. The ALJ found that the Facebook posts were a continuation of the May, 2012 meeting and, therefore, protected concerted activity. It is puzzling why is the General Counsel is even making this argument when the ALJ ruled in its favor on this issue.

What the General Counsel omits from its brief is that Callaghan admitted that this May meeting has been encouraged by management. (RT at 49:10-23.) Callaghan also admitted on cross-examination that he understood how someone reading the posts could be troubled by the statements being made by people working with youth. (RT 55:7-9.) He understood how someone from management could have a different interpretation (other than his self-serving explanation for his profanity soaked posts), and that they may be concerned reading the posts. (RT at 55:15-21 & 56:4-6.) Further, he understood that he was to present an example of positive conduct in working at the Beacon, and to model positive behavior standards and values. (RT at 51:8-10 & 71:8-15.) He admitted that if a youth had access to the posts, in his opinion

that he would not be a positive model for youth. (RT at 51:16-24.) He had no way of knowing if parents, youth, school officials or others saw the posts. (RT at 52:11-53:1.)

Charging party acknowledged that his job was to keep youth safe. (RT at 58:18-19.) He admitted that taking kids on field trips without permission would not be safe and "graffiting up" the walls would not be safe or appropriate. (RT at 59:20-60:1.) Additionally, "ordering shit" without permission would not be appropriate, nor would "fucking it up" be an appropriate thing to do." (RT at 59:2-6.)

2. There Is No Evidence to Support General Counsel's Claim That Recision of the Re-Hire Letters Was A Preemptive Strike to Ward Off Protected Concerted Activity (Exception Nos. 14-15)

The General Counsel also faults the ALJ for not emphasizing the "intemperate and profane language" used in the Facebook posts, claiming Callaghan and Moore used such language "to convey solidarity with each other" and that their posts show they were to continue discussing the workplace when they returned. (General Counsel's Brief at p. 7.) General Counsel cites *Parexel International, LLC*, 356 NLRB 82 for the proposition that an employee is protected under the act when an employer conducts a "pre-emptive strike to prevent an employee form engaging in activity protected by the act by terminating the employee prior to a concerted discussion." In a stretch, General Counsel argues that Callaghan's comment that he would "be back to raise hell wit ya" showed his intent to continue with the protected concerted activity in the new school year. (General Counsel's Brief at p. 7.)

There is absolutely no evidence in the record to support a finding that the recision of the re-hire letters was a "pre-emptive strike" to ward off any protected activity to support General Counsel's "theory" in this regard. To the contrary, the only evidence shows confirms that the re-

hire letters were rescinded because Callaghan and Moore statements they would not do what they were hired to do, would not accept direction and would do whatever they wanted. (Joint Exhibits 10 & 11; RT 133:13-134:2, 167:5-16 & 197:10-25.) The recision letters had nothing to do with any complaints about the working conditions. (RT 133:16-19, 168:6-19 & 197:17-25.).)

3. Callaghan's After the Fact Attempt to "Explain" His Facebook Comments Does Not Change Anything (Exception Nos. 9-10)

The General Counsel faults the ALJ for not citing in the Decision that Callaghan sent Respondent an email on August 20, 2012, trying to "explain" his Facebook posts. (General Counsel's Brief at p. 8.) First, this email was sent 18 days *after* the Facebook postings were made, over two weeks *after* Respondent saw the postings and a week *after* Callaghan's re-hire letter had been rescinded on August 13, 2012. (Joint Exhibit 10.)

By the time Callaghan sent the email, Respondent had already seen the Facebook conversation and had already issued the recision letters, so this email could not affect Respondent's "interpretation" of the conversation, as General Counsel advocates. The email is clearly an after-the-fact attempt by Callaghan to rewrite history, resurrect his job or, as appears to be the case, set up this litigation.

Further, the email actually contradicts the General Counsel's assertion that the Facebook postings are protected concerted activity. In this email, Mr. Callaghan himself admits that his Facebook Postings were "[no]thing more than consoling a co-worker who felt unappreciated at a job." (General Counsel Exhibit 6.) Thus, he admits he was only trying to console a co-worker, much like the situation in *Wal-Mart.*

The General Counsel's argument about whether Respondent could reasonably have interpreted the Facebook postings as "a plan of future misconduct" misses the point. First, given the remarks (as quoted above) it is clear that these individuals were not suited to work with youth - whether or not they intended to follow through on their threats. Even if they did not intend to abandon youth (as Moore stated) or take unauthorized field trips (as Callaghan stated), it was clear they were not going to follow the rules or listen to their supervisors, which was the basis for their termination. It was also undisputed that the postings in and of themselves threatened the contract the Beacon had with the San Francisco Unified School District and other funders. The General Counsel's argument is misplaced.

Finally, this is a pure question of credibility resolved by the ALJ. Respondent called all three witnesses who made the decision to rescind the re-hire letters (Jan Nicholas, Michelle Cusano and Patriacia Kaussen). All three of these witnesses testified unequivocally that they were primarily concerned that the Facebook posts jeopardized the safety of the Beacon youth whom Callaghan and Moore were responsible for overseeing. As a secondary concern, they expressed that the postings violated rules and regulations the Beacon was required to follow to maintain its funding with the San Francisco Unified School District, as well as other funders, therefore jeopardizing the very existence of the organization. The ALJ saw Respondent's witnesses and was able to assess their demeanor and credibility. This should not be second guessed by the Board.

II. THE ALJ CORRECTLY FOUND THAT THE FACEBOOK CONVERSATION LOST PROTECTION OF THE ACT (Exception No. 22.)

A. The Evidence Shows that The Facebook Posts Lost Protection Under the Act Considering the Totality of the Circumstances and that Respondent's Reading of the Facebook Conversation Was Reasonable

As correctly determined by the ALJ, the Facebook posts lost protection under the NLRA. The Decision reads:

> Respondent receives grants and other funding from the government and private donors. It is accountable to the middle schools and high schools that it services. Respondent believed that the Facebook comments jeopardized the program's funding and the safety of the youth it serves. Respondent was concerned that its funding agencies and the parents of its students would see the Facebook remarks. I find that Respondent could lawfully conclude that the actions proposed in the Facebook conversation were not protected under the Act and that the employees were unfit for service.

(ALJ Decision at 6:23-29.)

The statements were disloyal, threatened the safety of the youth and were detrimental to the Beacon's eligibility for grants and other funding. *See NLRB v. Local Union No. 1229 IBEW ("Jefferson Standard")*, 346 U.S. 464, 472 (1953) (Employees who engage in acts of disloyalty toward their employers, even if concerted, are not protected under §7 of the NLRA). The Supreme Court in *N.L.R.B. v. Local Union No. 1229*, 346 U.S. 464, 472 (1953) ruled that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer."

Similarly, the Seventh Circuit echoed this sentiment in *N.L.R.B. v. Knuth Brothers, Inc.*, 537 F.2d 950 (7th Cir. 1976). In *Knuth Brothers*, the employees were discharged for disclosing confidential business information which could have jeopardized the employer's business

relationships. *Id.* at 955. The Court determined that "Section 7 does not immunize an employee from discharge for acts of disloyalty or misconduct merely because those acts were associated with protected activity. *Id.* at 953. The Court concluded that in revealing the information, *the employee acted in reckless disregard of his employer's business interests. Id.* at 956. The Court further stated that the employer had the right to expect its employees to use greater care in using information acquired in the course of their employment. Failure to use such care was an act of disloyalty to the employer.

Likewise, Callaghan's reckless statements regarding what rules he planned to refuse to follow in the impending school year, in spite of several protocols that must be adhered to in order to maintain grants and other funding, could have seriously harmed the RDNC.

Callaghan's disloyal and detrimental statements included:

1) "[...] having crazy events at the Beacon all the time. I don't want to ask permission, I just want it to be LIVE."
2) Let them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach the kids how to grafitti up the walls and make it look cool, get some good food."
3) Let's do some cool shit, and let them figure out the money. No more Sean. Let's fuck it up."
4) "[...] this year all I wanna do is shit on my own. have parties all year and not get the office people involved. just do it and pretend they are not there."
5) "hahaha! fuck em. field trips all the time to whereever the fuck we want!"

(Joint Exhibit 7.)

Moore's disloyal and detrimental statements included:

1) "when they start loosn kids I aint helpn HAHA."
2) "sO we just gobe have fuN dOin activites and the best part is WE CAN LEAVE NOW hahaha I AINT GOBE NEVER BE THERE"
3) "We gone have hella clubs and take the kids :)"

(Joint Exhibit 7.)

Not only does the RDNC receive various grants and other funding from the government and private donors, but it is also accountable to the middle schools and high schools that it services. The MOU between RDNC and the SFUSD, as well as the SFUSD Parent/Student Handbook, mandate that Beacon staff meet certain requirements. (Respondent's Exhibits 1 & 2.) The things said in the Facebook posts violated the MOU and the Handbook and jeopardized the Beacon's funding (in addition to threatening the safety of the youth) as discussed in detail by Jan Nicholas and Michelle Cusano at the hearing. (See, e.g., RT at 154:24-158:6 & 169:14-172:16.)

For example, the MOU states that the Beacon must "ensure that Beacon staff use the safe student behavior policies as those outlined in the SFUSD Student & Parent/Guardian Handbook." It further states "the Beacon center's failure to provide safe and secure programming and services for youth shall be a cause of termination of this MOU." (RT 129:11-24; Respondent's Exhibit 2.) The Handbook requires positive behavior (i.e., positive code of conduct) from Beacon staff, which the Facebook postings violated. (RT 130:10-22.)

Charging Party admitted that he knew the Beacon had to follow the rules from the San Francisco Unified School District. (RT at 49:24-50:1.) He understood that George Washington High School had a zero tolerance policy on graffiti. (RT at 54:22-55:3.) He admitted that kids dropping out of the program would be a threat to funding. (RT at 65:17-19.) If a parent pulled a child from the program because of the posts, it could cause financial damage to the Beacon. (RT at 66:21-67:7.) Likewise, Respondent's co-worker, Cole Manieri, testified there were lots of polices at the SFUSD and Excel (another grant provider) and that the Beacon staff had to follow their rules in order to obtain funding. (RT at 118:1-3.)

Callaghan admitted on cross-examination that he understood how someone reading the posts could be troubled by the statements being made by people working with youth. (RT at 55:7-9.) He understood how someone from management could have a different interpretation (other than how he tried to explain the posts), and that they may be concerned reading the posts. (RT at 55:15-21 & 56:4-6.)

Further, he understood that he was to present an example of positive conduct in working at the Beacon, and to model positive behavior standards and values. (RT at 51:8-10 & 71:8-15.) *He admitted that if a youth had access to the posts, in his opinion that he would not be a positive model for youth.* (RT at 51:16-24, emphasis added.) He had no way of knowing if parents, youth, school officials or others saw the posts. (RT at 52:11-53:1.)

Charging Party acknowledged his job was to keep youth safe. (RT at 58:18-19.) *Taking kids on field trips without permission would not be safe and "graffiting up" the walls would not be safe or appropriate.* (RT at 59:20-60:1, emphasis added.) *"Ordering shit" without permission would not be appropriate, nor would "fucking it up" be an appropriate thing to do."* (RT at 59:2-6, emphasis added.)

Chloe Garabato, a recent graduate of George Washington High School and former Beacon participant, had access to and was a part of the Facebook Chain. (See Joint Exhibit 7.) Had other students, parents, donors or members of the George Washington High School staff seen this Facebook Chain, they would have found the statements alarming and would have questioned the legitimacy of RDNC programs. They would also question the caliber of employees that the RDNC permits around its youth, putting RDNC programs in jeopardy. In this vein, Ms. Nicholas testified that her overall concern was that "some parent, possibly school

officials, would see the posts and wonder why we were hiring people like this. And why we we'd have people who were saying they didn't want to ask permission, et cetera, work with children." (RT at 123:14-18.) A red flag was the statement that they were going to teach the kids graffiti, which was specifically prohibited by the SFUSD. (RT at 124:1-8.)

The posts were also a funding threat. (RT at 127:11-19.) Ms. Cusano, Beacon Director, reiterated that the things that Charging Party and Ms. Moore were saying they were going to do could jeopardize funding and the safety of the youth. (RT at 154:24-156:3 & 157:20-158:6.) Ms Cusano's overall concern was the safety of the kids. (RT at 159:8-10.) She did not feel comfortable bringing Mr. Callaghan and Ms. Moore back to campus after the Facebook posts because of safety concerns and wondering how these people could be role models for youth. (165:20-167:16 & 172:8-16.).

Former Executive Director Patricia Kaussen was "horrified" when she saw the posts. She was also primarily concerned about youth safety because of the posts, and secondarily about funding. (CT at 192:10-24.)

The NLRB should not come to Mr. Callaghan's aid and attempt to seize the RDNC's ability to protect its youth and programs. RDNC made the decision to rescind Mr. Callaghan's re-hire letter due to his extremely poor judgment and threats to violate rules such as taking youth out for field trips any time he wanted, not because of any protected concerted activity. The same is true with respect to Ms. Moore. These threatened actions could expose RDNC to significant liability should Claimant take an authorized field trip (as threatened) or leave the kids unattended (also as threatened) if a youth were to get injured.

B. The ALJ Applied the Correct Standard and Reached the Correct Result (Exception Nos. 23 & 27)

General Counsel cites *Fresenius USA Manufacturing, Inc.* 358 NLRB 138 (2012) for the proposition that the "totality of circumstances" must be looked at to determine if the statements made by one employee to another lose protection of the act. (General Counsel's Brief at p. 10.) *Fresenius* does not aid the General Counsel's argument and it does not disregard the test set out in *Atlantic Steel Co.* 245 NLRB 814 (1979) as General Counsel may be advocating. To the contrary, *Fresenius* goes through the various factors in *Atlantic Steel* in rendering its decision. It then goes on to discuss that under the "totality of the circumstances" test, the result would be the same. It states "necessarily, analysis of the totality of the circumstances encompasses the *Atlantic Steel* factors discussed above." The same is true in this case - whatever standard is used, the same result is reached: the Facebook postings lost protection under the Act.

In *Fresenius*, in the midst of a decertification campaign, three union newsletters with handwritten statements were found in the employee breakroom. The statements were "Dear Pussies, Please Read!" "Hey cat food lovers, how's your income doing?" and "Warehouse workers, RIP." Female employees complained about the statements. The employer investigated and later discharged the employee who had written the statements. On appeal, the Board had to determine whether the employee's writing these statements during a union certification campaign was egregious enough to lose protection of the Act. The Board found it was not.

The facts in this case are vastly different. First and foremost, we are dealing with a situation where the question is whether threats to leave youth unattended, take then on unauthorized field trips, graffiti the walls, disobey supervision and otherwise disregard rules and regulations of the Beacon is egregious enough to lose protection of the act. The ALJ correctly

answered the question affirmatively. [4]

Also, the *Fresenius* decision makes an important point applicable in this matter: *Fresenius*, in finding that the vulgar comments did not lose protection of the act, states: "[t]here is no evidence whatsoever that Grosso's [the terminated employee] commentary interfered with Fresenius' production, **challenged any supervisor's or manager's authority, or otherwise undermined its ability to maintain order and discipline at the Chester facility.**" (Emphasis added.) In contrast, in this case, this is exactly what the comments made by Callaghan and Moore did - challenged their supervisor's authority (indeed, stated they would not follow supervision) and otherwise undermined the rules at the Beacon, to put it mildly.

Moreover, *Fresenius* was not a social media case and, more importantly, did not involve an employer responsible for ensuring the safety of youth, as is the situation here. General Counsel never mentions this fact and would like to sweep it under the rug. Yet, this is a fundamental consideration which cannot be conveniently discarded. The ALJ correctly recognized this fact. (ALJ Decsion at 6:24-26 "Respondent believed that the Facebook comments jeopardized the program's funding and the safety of the youth it services," emphasis added.)

This Board can read the Facebook posts and see the inherent problems which they posed to Respondent. Whether analyzed under *Atlantic Steel* or a totality of circumstances approach, the result is the same. The posts were egregious enough to lose protection of the Act when

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[4]The Facebook posts were filled with offensive profanity laced comments as well, although this was not the basis for rescinding the re-hire letters. It has been held, however, that an employee's otherwise protected activity may become unprotected "if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane defamatory, or malicious language. *Honda of America Mfg.*, 334 NLRB 746, 747 (2001)

viewed in light of the facts of this case and evidence introduced at the hearing. The postings show Callaghan and Moore were unfit for supervising youth and Respondent had no choice but to rescind the re-hire letters.

C. General Counsel's "Context" Argument is Misplaced (Exception Nos. 1, 17-23)

The re-hire letters were not rescinded based on the profanity in the Facebook posts, so General Counsel's argument that profanity does not remove the communication from the protection of the Act (General Counsel's Brief at pp. 10-12) is irrelevant.

This is not a situation involving "figurative speech" as in *Kiewit Power Constructors Co.*, cited by the General Counsel. (General Counsel's Brief at p. 11.) This is a matter of two employees responsible for overseeing youth stating they were not going to follow-rules set in place for the safety and protection of the youth.

General Counsel tries to "explain" what Callaghan meant by the posts with is self-serving trial testimony (General Counsel's Brief at p. 13) and claims that the conversation was just "contemporary urban figure of speech (*Id.* at 14). General Counsel's argument is disingenuous - they advocate that the *subjective* explanation by Callaghan should be adopted rather than the *objective* standard applied to Respondent. The language says what it says. Period. Further, and importantly, General Counsel did not put Moore on the stand to "explain" what her posts supposedly meant, even though she was right outside the courtroom during the entire hearing. Thus, there is no evidence of what she supposedly meant in her postings to support General Counsel's interpretation.

General Counsel claims "It is undisputed that Callaghan and Moore had no history of previous disciplines" (citing TR 142, 180) and "They had recently received positive evaluations from Supervisor Payan for their work performance." citing Joint Exhibits 3 & 4. This is a flat out misrepresentation. Evidence admitted at the hearing shows that Ms. Moore's summer supervisor, Shawn Brown, said he would not re-hire her and marked her performance as "poor." (RT 173:8-21; Respondent's Exhibit 3.) Likewise, there is no evidence that "Respondent believed they were excellent employees and selected them over other employees for re-hire" (General Counsel's Brief at p. 14, citing Joint Exhibits 5 & 6.) The cited exhibits say no such thing.

General Counsel claims that Ms. Moore was "demoted" for her position in the fall of 2012. This was after she had received the unfavorable review from her summer supervisor, who recommended she not be re-hired. Instead of not rehiring her, Respondent changed her position to one where she would be interacting with the youth instead of performing the data entry she complained about. It is important to note that her salary ($16 per hour) remained the same.

Finally, Jan Nicholas testified that after Ms. Moore's recision letter was sent, Ms. Moore called her and screamed at her and threatened "I'm going to come down and get in your face." (RT at 137:4-138:9; Respondent's Exhibit 4.)

D. The Timing of the Decision to Rescind the Re-Hire Letters is Irrelevant and a Red Herring (Exception Nos. 4-8, 16 & 25-29)

Again, General Counsel attempts to imply some "evil motive" to Respondent since soon after Michelle Cusano saw the statements, she sent an email to HR Jan Nicholas requesting that Callaghan and Moore not be rehired. The General Counsel contends that since Ms. Cusano made that decision within 6 minutes of receiving Ms. Huck's email, that meant she had no time to

consult either the MOU or student/parent guide on which Respondent based its decision to terminate before recommending termination. What the General Counsel omits is that Ms. Cusano testified at trial that she knew the requirements in the documents by heart and did not need to consult the documents. (RT at 182:2-11.) She testified on cross-examination as follows:

> Q: And in between that time, before this meeting happened, had you looked at either the parent/guardian handbook or the memorandum of understanding?
> A: I kind of know it by heart.
> Q: You know it by heart?
> A: Not the whole thing by heart, but I know it very well. I'm very familiar with these two documents.
> Q: Okay. All right. So you knew what specific sections you thought that these Facebook posts were violating?
> A: **Oh, yes, yes**.

(RT at 182:2-11, emphasis added.)

The fact that these documents were not at the meeting where the decision was made to rescind the re-hire letters is of no avail.

E. The Fact that the Recision Letters Do Not Specifically Mention Funding Concerns If of No Import (Exception Nos. 37-40)

There is no obligation or legal authority requiring that every reason for an employee's separation be listed in a the letter. Here, the letters rescinding the re-hire letters more than sufficiently state the basis for the decision made by Respondent. The General Counsel again grasps at straws in an effort to imply some "evil motive" on the part of Respondent. However, this is speculation and conjecture on the part of the General Counsel. The ALJ was in a position to assess the credibility of Respondent's three witness and did so in reaching the decision. (ALJ Decision at page 1, fn. 1)

IV. THE REMEDIES DISCUSSION IS IRRELEVANT SINCE RESPONDENT DID NOT VIOLATE THE ACT

Respondent did not violate the Act in rescinding the re-hire letters issued to Callaghan and Moore. Thus, the discussion in General Counsel's brief of "Remedies" (at pp. 18-20) is irrelevant. [5]

CONCLUSION

There is no basis for disturbing the ALJ's decision following the July, 2013 hearing in this matter. However, if the Board is inclined to review the matter, then Respondent respectfully submits that the finding that the Facebook Posts constitute protected concerted activity should also be examined and reversed.

Dated: January 28, 2014

Respectfully Submitted,

VOGL MEREDITH BURKE LLP

Michael S. Burke
Nicole L. Meredith

[5]Callaghan testified that he has another job as a relief counselor at the Progress Foundation. (RT 62:12-14.) The General Counsel did not call Moore as a witness, so there is no evidence as to her employment status.

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 456 Montgomery Street, 20th Floor, San Francisco, CA 94104 and business telephone number is (415) 398-0200.

On January 28, 2014, I served the parties in this action as follows:

- **RESPONDENT RICHMOND DISTRICT NEIGHBORHOOD CENTER'S OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

__X__ by having a true copy thereof caused to be served via **electronic service** to the person(s) at the address(es) as set forth below.

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and was executed on January 28, 2014.

KATHERINE ENG